Published June 13, 1894

Supreme Court Syllabi

E. A. Barber vs. C. Van Horn. Error from Allen County.

AFFIRMED. SYLLABUS. BY THE COURT. HORTON, C. J.

1. Every partner is a general agent of the firm to carry out and transact its business in the usaal and ordinary way.

2. It is the general principle relating to commercial or trade partnerships that each partner is the lawful agent of the partnership in all matters within the apparent scope of the business. Deitz vs. Regnier, 27

each partner is the lawful agent of the partnership in all matters within the apparent scope of the business. Deitz va Regnier, 7 Kas., 94.

3. The knowledge of one partner concerning partnership matters is constructively the knowledge of all the members of the partnership, although the other members are actually ignorant thereof.

4. Where a private banking firm obtains money for the purpose of carrying on its usual and ordinary business from another person with the knowledge of all the members of the firm, and execute a firm note therefor, and afterward one of the partners of the firm withdraws from the assets of the firm sufficient moneys to pay the note and falsely informs the other members of the firm that the note is paid, and such note is shown by the books of the firm to be satisfied and canceled, but is not in fact paid off, and such partner, without the knowledge of the other members of the firm, continues to pay interest upon the note, and when dus, renews the same in the name of the firm, the new note, if the payee has no notice to the contrary, is binding upon the firm as a valid obligation thereof.

5. The fact that the partner signed his individual name to a renewal of the old note, given by the firm, before signing that of the firm, may be considered by the trial court in determining whether or not the payee had reason to know the new note was executed without the knowledge of the other partners, or in fraud of their rights.

All the justices concurring.

A true copy.

A true:

C. J. BROWN, [SEAL]

C. J. BROWN, Clerk Supreme Court. [SEAL]

Lorenzo D. Stephenson, et al. vs. Albert H. Elliott.

Error from Jackson County. REVERSED.

STLLABUS. BY THE COURT. HORTON, C. J. I. Where the grantee of a deed enters into an agreement with the grantor that he will assume and pay all of the mortgages and encumbrances on the land conveyed at the time of the execution of the deed, but by the mutual mistake of the parties the deed in its written form does not express this contract, equity has jurisdiction to reform the written instrument so as to conform to the intention, agreement and understanding of the parties.

2 Where the grantee, as a part of the consideration for the conveyance of a tract of land, accepts a deed which provides that he "assumes and agrees to pay all the claims, mortgages and interest of whatsoever nature of record at the date of the deed," he becomes thereby personally liable to the mortgages to pay the mortgages on the premises so conveyed to him.

All the justices concurring. I. Where the grantee of a deed enters into

All the justices concurring. C. J. BROWN, Clerk Supreme Court. [SEAL]

Harry Talcott vs. The First National Bank of Larned.

Error from Pawnee County. AFFIRMED.

BY THE COURT. HORTON, C. J. A pass book given by a bank to a depositor is not a written contract but is prima lacie evidence that the bank received the amounts at the dates therein stated and binds the bank like any other form of a receipt and is open to explanation by evidence alitade. 2. When an appeal is taken to the district court from the judgment of the justice of the peace, and full pleadings are filed in that court, the parties are bound thereby; and if it appears from the answer of the defendant that no counter-claim, set-off or other defenses is alleged, and it is shown by the pleadings, including the allegations in the answer of the defendant, that the plaintiff is entitled to be dement, the court may render judgment.

to judgment, the court may render judgment, upon the pleadings on the motion of the All the justices concurring. A true copy. Attest: C. J. BROWN, Clerk Supreme Court.

7134.

W. M. Benham and A. T. Lea vs. J. B. Smith. Error from Cherokee County. REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J. 1. The case of Hill vs. Bank, 42 Kas., 254, followed. followed.

2. A certain promissory note payable to S. and signed "Wm. M. Benhain, President Odd Fellows Hall Association; A. T. Lea, secretary," was sued upon by S., the original payee to hold Benham and Lea personally liable. The answer alleged that the note was the obligation of the Odd Fellows Hall Association and referred to a mortgage given by the association to S. upon certain real estate to secure the note. The mortgage concluded as follows: "In winess whereof the said party of the first part has consented this deed to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the day and year aforesaid. W.M. Benham. President Columbus Odd Fellows Association. Attest:

Attest:
A.T. LEA. Secretary.
A.T. LEA. Secretary.
Held, That B. & Lethe president and secretary of the association could introduce the mortgage and also parol evidence to show they signed for the association only and that it was the intention of all the parties to the note to make it the obligation of the association.

All the justices concurring. A true copy. Attest: C. J. BROWN, Clerk Supreme Court. [SEAL]

7123. Union Pacific Town Site Company vs. Charles Page, et al.

Error from Shawnee County. REVERSED. SYLLABUR BY THE COURT. HORTON, C. J.

An agent of a town site corporation engaged in building and promoting a town has no implied authority to purchase lumber and other supplies for private individuals to construct buildings upon their own lots, purchased by them from the town site company, and to make the corporation liable for such lumber and supplies.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN.

C. J. BROWN. [SEAL] Clerk Supreme Court.

Bradley, Weeeler & Co., et al., vs. Frank Borin. Error from Rooks County.

MODIFIED. SYLLABUS. BY THE COURT. HORTON, C. J.

In an action for damages on account of the wrongful levy of an attachment upon goods, wares and merchandise, special damages for loss of profits not alleged in the petition can not be recovered.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN. C. J. BROWN,

Clerk Supreme Court.

State ex rel, Alfred J. Harwi, vs. W. D. Webb, Judge, et al.

WRIT DENIED.

SYLLABUS.

[SEAL]

BY THE COURT. HORTON, C. J. With a view to substantial justice between With a view to substantial justice between the parties, a trial court, even after a motion for a new trial is overruled, may reserve for future consideration the question whether judgment should be entered upon the verdict of the jury. Sec. 409, Civil Code.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN,

[Swart]

Clerk Supreme Court. C. J. BROWN, Clerk Supreme Court.

7151. George P. Cole vs. J. M. Bower. Error from Cowley County.

AFFIRMED. SYLLABUS. BY THE COURT. HORTON, C. J.

1. Where it is urged that errors of law occurred upon the trial, and the record shows that the motion for a new trial was overruled, put neither the motion, nor the grounds contained therein are preserved, the supreme court can not review the same.

2. "A party who has given a receipt admitting payment in full has the right always to show by parol evidence that it was given by mistake, and that it was untrue." Clark vs. Marbourg, 38 Kas., 471.

Ali the justices concurring.

A true copy.

Attest:

C. J. BROWN, [SEAL]

059. Thomas A. Kirk vs. John G. Goodwin, et al. Error from Wyandotte County. AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J. Where a contractor enters into an agreement with the equitable owner of certain lots to furnish material and labor for the improvement of the same, and subsequently files a mechanic's lien upon the lots, alleging therein that he has furnished the material and performed the labor in accordance with his contract with the equitable owner and that the person contracted with is the owner of the lots, and afterwards in an action brought by the contractor against such equitable owner to recover a personal judgment against him for the material and labor furnished and to foreclose his mechanic's lien upon the lots—the party, who has the legal title, is also mide a defendant in that action, and such contractor obtains a personal judgment against the equitable owner for the full amount of his claim for material and labor and a foreclosure of his mechanic's lien with a decree barring therein all the time and interest of the defendant holding the legal title, and thereafter collects a part of the judgment from the proceeds of the sale of the lots, and then subsequently brings his action to recover a personal judgment against the party, who had the legal title at the date of the former judgment, upon the ground that such party agreed to become responsible and pay the contractor for his work, if he would finish the same, such contractor is not entitled to recover a new or further judgment sgainst the party, who held formerly the legal title and was one of the defendants in the prior action.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN,

Clerk Supreme Court. Where a contractor enters into an agr

7109. The Farmers' Stock Breeding Association vs. Adam Scott, et al. Error from Norton County.

REVERSED.

SYLLABUR. BY THE COURT. HORTON, C. J. 1. Representations made by a seller to a purchaser after a contract of sale has been consummated, are not actionable.

2. To maintain an action for fraudulent representation made to induce a sale, the representation must have been known to be faise by the person making it, or at least he must have made it without reasonable grounds for believing it to be true.

3. Where the seller gives to the purchaser a written warranty, the purchaser can not maintain an action upon a contract of warranty not included in such written instrument received by him.

All the justices concurring.

All the justices concurring. C. J. BROWN. Clerk Supreme Court.

L. F. Crosby va. W. P. Wilson, as Sheriff of La-bette County, Error from Labette County. AFFIRMED.

SYLLABUR BY THE COURT. HORTON, C. J. A general exception to an entire charge of a court, where any portion of the same is correctly given, is insufficient. State vs. Wilgus, 32 Kas., 136.

2. In order to preserve in a case-made all the evidence introduced upon the trial a statement to that effect should be inserted in the case itself, and not in the certificate of the trial judge. Eddy vs. Weaver, 37 Kas., 540.

All the justices concurring.

A true copy. A true copy. C. J. BROWN,

Clerk Supreme Court. Tootle, Hosea & Co. vs. C. R. Rice, et al.

Error from Pratt County. REVERSED. SYLLARUS. BY THE COURT. HORTON, C. J.

1. The property of a co-partnership is the joint property of the partners and unless all the partners consent to do so, one partner can not dispose of the property of the partnership to satisfy his individual debts.

2. The consent of a partner to the sale and transfer of the joint property of the partnership by one partner to satisfy his individual debts must be established in a satisfactory monner, not resting upon vague and uncerdetts must be established in a satisfactory monner, not resting upon vague and uncertain inferences; otherwise the rights of the non-consenting partner may be improperly sacrificed and the creditors of the partnership unjustly deprived of a priority of payment out of the partnership assets, All the justices concurring.

A true copy.

Attue:

C. J. BROWN.

C. J. BROWN, Clerk Supreme Court. Attest:

In the Matter of the Estate of E. B. Mallory, Deceased, and Fannie Mallory, Administra-trix, vs. The Burlington & Missouri River Railroad Company in Nebraska.

Error from Atchison County. AFFIRMED. SYLLABUR. BY THE COURT. JOHNSTON, J

1. Where a person dies intestate who is not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of the state has no jurisdiction to issue letters of administration on the estate of such intestate; and where letters are issued, the acts of the court in doing so are utterly null and void.

intestate: and where letters are issued, the acts of the court in doing so are utterly null and void.

2. Letters so issued without authority may be set aside by the court in which they are issued upon its own motion, or such action may be taken at the instance of anyone interested in the administration; and where an action has been brought by the administrator against a railroad company to recover damages for an injury alleged to have caused the death of the intestate, the company has sufficient interest to make it a competent party to institute proceedings for a revocation of the letters of administration.

3. Where letters of administration are issued without jurisdiction, and the probate court, upon a hearing, determines and orders that they be declared null and void, the person illegally appointed as administratic is not entitled to appeal from such an order without giving the appeal bond required from ordinary appellants.

All the justices concurring.

A true copy.

Attest:

Cestk Supreme Court.

C. J. BROWN, Ciesk Supreme Court. [SEAL]

Error from Dickinson County. AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J. 1. A judgment in favor of the owner for the recovery of a part of a number of animals from an officer who had wrongfully seized them upon an execution against another than the owner, where all of the animals were selred and taken from the possession of the owner at the same time and upon the same writ, is a bar to the maintenance of another action by the owner against the officer to recover the remaining animals so seized and detained.

2. A motion for a new trial on the ground of newly discovered evidence will not be sustained where it appears that the testimony reiled upon was within the knowledge of the party, who was absent from the trial, but who had failed to communizate the facts to the attorney who appeared in his behalf.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN,

[SEAL]

Clerk Supreme Court

C. J. BROWN, Clerk Supreme Court [SEAL]

J. C. Ard vs. C. H. Pratt. Error from Allen County. AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON J

SIN 1873. M. obtained a patent from the
United States for a tract of land, but never
took actual possession of the same. A., claiming title, went into possession of the same
land in 1873, but never paid any taxes thereon,
and this possession, which was exclusive and
adverse, continued for more than fifteen years,
and until the title of M. was extinguished by
adverse possession. The taxes on the land for
1883 were not paid, and it was sold to a
stranger for taxes, and a tax deed therefor
was issued in 1837. In 1889, and after the statute
of limitations had run against the patent title,
M. purchased the outstanding tax title and
subsequently conveyed the same to P., who
brought an action to recover the land from A.
Held. That as M. owed no duty to A. to pay the
taxes, and as their claims to the land were antagonistic, M. was not disqualified to purchase
the outstanding title nor was the grantee of
M. precluded from relying upon the same as
against the adverse possession and claim of A.
All the justices concurring.
A true copy.

Attact:

C. J. BROWN. SYLLABUS. BY THE COURT. JOHNSTON J.

A true copy. C. J. BROWN, [SEAL] Clerk Supreme Co

Alfred Blaker, Administrator, etc., vs. Hood & Kincaids and O. E. Morse, Receiver.

Error from Linn County. AFFIRMED. SYLLABUS. BY THE COURT. JOHNSTON, J

1. The provisions of the constitution authorizing the organization and control of banks of circulation do not lim t the legislative power nor operate to prohibit the enactment of laws imposing reasonable regulations upon banks of deposit and discount.

2. The act providing for the organization and regulation of banks [Chap. 43. laws of 1891] is held to be within the scope of the police power of the state and not an unconstitutional infringement of private rights.

3. The act does not contravene the constitutional provision which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

All the justices concurring.

A true copy. Attest: [SEAL] C. J. BROWN, Clerk Supreme Court.

J. N. Stewart vs. M. E. Fowler & Co. Error from Shawnee County.

7183.

AFFIRMED. SYLLABUS. BY THE COURT. JOHNSTON, J.

1, Under a contract whereby brokers agreed with the land owner to find a person with whom the owner would make a contract for the sale of his land at a fixed price and upon terms satisfactory to himself at a stipulated commission, the brokers found a purchaser who contracted with the owner for the land at the price agreed upon, payments to be made in installment, and giving the owner the opthe price agreed upon, payments to be made in installments, and giving the owner the option in case of any default of the purchaser to declare the contract and the payments there under forfeited. The purchaser was then ready, willing and able to comply with the conditions of the contract, and subsequently made two of the payments provided for, but defaulted in the others, and the owner, instead of enforcing the contract, chose to declare a forfeiture and to retain the payments which had been made, but declined to pay the commission. Held, That the brokers had earned their commission when the purchaser was found by them and accepted by the owner, and that they cannot be deprived of the same because the deferred payments were not made by the purchaser and the terms of the contract fully carried out.

2. A finding of the jury, based upon sufficient testimony, to the effect that the landowner accepted the services performed by the brokers as a compliance with the conditions of their contract with him, renders immaterial a departure from some of the conditions of the contract, and authorizes a recovery of the compensation for such services.

3. Stewart vs. Fowler, 37 Kas., 677, distinguished and limited.

All the justices concurring.

All the justices concurring. A true copy. C. J. BROWN.

Clerk Supreme Court. [SEAL]

9514. A. D. Rathburn vs. H. H. Hamilton.

Original Proceedings in Quo Warranto, DEMURRER TO ANSWER OVERRULED.

1. Where a political party assembled in convention places in nomination a candidate for a county office, and the president and secretary of such convention executes and verifies a proper nomination certificate, which is presented to the county clerk in due time to be filed, and is left with him for that purpose, it will be deemed to be filed within the meaning of the Australian ballot law, although no indorsement of filing is written thereon, and although it is afterward mislaid or lost through the inadvertence or negligence of such officer.

2 Where a nomination certificate is found to be insufficient or inoperative, the defect may be corrected by the political party or persons, in the manner pointed out by section 9 of that law, at any time before election day.

lection day.
All the justices concurring. A true copy. C. J. BROWN, Clerk Supreme Court [SEAL.]

The Wichita National Bank vs. Geo. H. Maltby, Administrator of the Estate of Charles War-ren, Deceased.

Error from Sedgwick County. REVERSED.

BY THE COURT. JOHNSTON, J.

1. In a controversy over the right to a bank deposit, where it is denied that the depositor was the owner of the fund and entitled to draw the same from the bank, it may be shown that the ownership of the deposit is in another, and that a payment to him releases the bank from liability.

2. In an action upon a certificate of deposit which is in form a negotiable instrument and is not in the possession of the plaintiff, and where ownership is alleged by the plaintiff, and unverified answer denying that plaintiff is the owner and holder of the certificate and alleging that another was the owner and had drawn the same from the bank with authority presents an issue for trial which precludes the sustaining of a motion for judgment upon the pleadings without proof.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN,

[SEAL]

Clerk Supreme Court.

Clerk Supreme Court

E. Eichholtz, Rufus Thrall and the Missouri, Kansas & Texas Railway Company vs. D. H. Martin, as County Clerk of Labette County, Kas., et. al.

BY THE COURT. JOHNSTON, J Chapter 140 of the laws of 1893, "An act to establish a county high school in Labette county, Kansas," does not contravene section 17 of article 2 of the constitution, which provides that laws of a general nature shall have a uniform operation throughout the state, and that no special laws shall be enacted where a general law can be made applicable; nor is it in conflict with section 2 of article 6, which authorizes the legislature to establish a uniform system of common schools and schools of a higher grade.

All the justices concurring.

A true copy. Attest: [SEAL] C. J. BROWN, Clerk Supreme Court.

Lilla L. Taylor, Agnes M. Ladd and Vinnie G. Ladd vs. Daniel Ladd and Mary Ladd.

Error from Clay County. AFFIRMED.

L. died, leaving three children as his only heirs. Several years before, under a parol agreement, his son, D., left a profitable position in another state and joined the father in the purchase of a farm, the son, D., contributing the greater part of the consideration. It was stipulated that D. should provide the father and mother a home, with suitable food and clothing, and care for them during their lives, in consideration of which the entire interest in the land should then become the property of D. The mother died soon afterwards, and the provisions of the agreement were substantially complied with by D. prior to the father's death, and when his mind was not sound, he conveyed his interest in the land to D. The agreement between the father and D. was known to the other children. After the father's death a daughter claimed a share of the land, and a dispute arcse to the proper division of the estate. A compromise was effected, by which D. agreed to pay her much more than her share of the personal estate, when she deliberately made a writing scknowledging the payment made to be her share of her deceased father's property, both real and personal; and settlement was made with the other heir upon substantially the same basis. Afterward, and for a period of ten years, the parties treated the settlement as effective and binding, and D. held possession of the land and made extensive and valuable improvements thereon, with the knowledge of the other heirs, and without objection or protest, when an action was begun by the daughter claiming a share in the land. Held, That her declarations and acts, as well as those of the other heirs, constitute an equitable estoppel which precludes the reopening of the settlement or the assertion by them of any interest or right in the land.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN, SYLLABUR. 'BY THE COURT. JOHNSTON, J

C. J. BROWN, Clerk Supreme Court.

7145. H. E. Shafer and J. C. Youngman vs. The First National Bank of Russell, Kas. Error from Russell County.

MODIFIED. BY THE COURT. JOHNSTON, J SYLLABUS. 1. Where a national bank makes a loan and 1. Where a national bank makes a loan and knowingly charges and receives a greater rate of interest than is allowed by the laws of the state where the bank is located, up till the maturity of the note, after which time it was agreed that the note should bear interest at a rate which was lawful, the receipt of the usurious rate will work a forfeiture of the entire interest which the note carries with it, including that which accrues after the maturity thereof.

thereof.

2 A judgment rendered upon such a debt will bear interest from the time of its rendition at the rate of 6 per cent, per annum.

All the justices concurring.

A true copy.

Attest:

[SEA1.]

[SEAL] Clerk Supreme Court.

7184. The Kansas City & Southwestern Railway Gompany and the Missouri Pacific Railway Company vs. Isabella K. Fisher. Error from Miami County.

AFFIRMED. BY THE COURT. SYLLABUS. ALLEN, J

 An attempted condemnation of land for the right of way of a railroad without giving the notice provided by paragraph 1395 of the general statutes of 1889 is void. general statutes of 1889 is void.

2. A railroad company organized under the laws of a neighboring state, which is in possession jointly with a railroad organized under the laws of Kansas, of a railroad constructed across plaintiff's land over which a right of way has never been purchased, nor condemned, claiming ownership thereof, is liable to the owner of the land, for the value of the land taken and the damages to the balance of the tract, and the plaintiff may recover against both railroad companies, as for a permanent taking and appropriation of such right of way.

All the justices concurring.

A true copy. Attest: C. J. BROWN, Clerk Supreme Court [SEAL]

William T. Rickards vs. D. A. Baldridge, Error from Reno County.

AFFIRMED.

1. A judgment or order made by a district court may for good cause afterward, at the same term, be set aside, and where an order of dismissal has been entered, but is afterwards at the same term in effect set aside, and the cause continued for a further hearing, the court does not thereby lose jurisdiction of the parties.

court does not thereby lose jurisdiction of the parties.

2. In an action to set aside several instruments affecting the title to real estate, and to recover an interest in the lands, where the court upon a hearing denies the plaintiff the relief asked, but grants him the right to file an amended petition, and proceed to an accounting between the plaintiff and the defendants as to the rights of the parties with respect to purchase money due plaintiff under the view of the court that the conveyances should be upheld, an amouncement by the court at the first hearing that it declines to set aside the various written instruments affecting the title to the property does not amount to an adjudication which will prevent the court on a final hearing from awarding the plaintiff the amount due him from one of the defendants, and making the same a first lien on the lands in controvery as against all the other defendants deriving title through him.

All the justices concurring.

All the justices concurring.
A true copy.
Attest: Clerk Supreme Court. [SEAL]

J. M. Anderson vs. S. H. Rodgers. Error from Hamilton County.

SYLLABUS. BY THE COURT.

REVERSED.

ime.
2. It is negligence in the holder of a check of send it directly to the drawee, residing in a distant place, for payment, and the holder is responsible for any loss occasioned by

is responsible for any loss occasioned by adopting such course.

3. The bank of H. as the agent of plaintiff, sent a check drawn by the defendant on the bank of R. distant about fifty five m les, to the back of R. by mail, with the re-uest that it remit the amount in Kansas City exchange. The check was received by the bank of R. on the evening of December 12. The bank of R. continued to do business during all of the following day, receiving deposits and paying checks. On the evening of that day after business hours, it deposited a letter enclosing the check with the statement, "No funds in bank," addressed to the bank in H. which was received by the bank of H. on the evening of the next day. The defendant had more than funds enough on deposit to pay the check. The bank did not open for business thereafter, and has never paid anything to either party, Held, That the loss must fall on the plantiff.

A true conv.

The City of Argentine vs. Harriet Daggett, Error from Wyandotte County,

AFFIRMED. The City of Argentine vs. G. H. Simmons, et al.

Error from Wyandotte County. AFFIRMED.

BY THE COURT.

ALLEN, J

SYLLABUS.

The grade of Second street in the city of Argentine was duly established by ordinance. Three-fourths of the owners of property fronting on the street thereafter petitioned for the grading of the street. An ordinance providing for plans, specifications, estimates, and the letting of the contract for such grading was thereupon passed, and a contract therefor afterwards duly let. After such letting another ordinance was passed materially changing the grade of the street. There was no new plan, estimate, contract or ordinance relating to such work, but the grading was done in accordance with the grade last established, and the city council after its completion passed an ordinance assessing the cost against the abutting lots; Held, That such assessment is invalid.

All the justices concurring.

A true copy.

A true copy. Attest: [SEAL] C. J. BROWN, Clerk Supreme Court.

The State of Kansas ex. rel. W. F. Means, County Attorney, vs. The City of Hiawatha and General Electric Company. Error from Brown County.

AFFERMED. SYLLABUS. BY THE COURT. ALLEN, J Section 60, of chapter 19, of the general statutes of 1888, confers on the council of a city of the second class the right to provide for and regulate the lighting of the streets, and under said section the mayor and council have the power to purchase an electric plant for lighting the streets. That clause in the section which authorizes them to make contracts with any person, company or association for such purpose does not restrict them to supplying light by such contract, but they may in their discretion provide lights for the streets and public places, in such manner as they deem best, Provided, They do not exceed their powers in incurring obligations or levying taxes.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN,

[SEAL]

C. J. BROWN, Clerk Supreme Court. [SEAL]

John L. Bell vs. Frank Sternberg. Error from Ellsworth County AFFIRMED.

BY THE COURT. SYLLABUS. A vendor of real estate who has executed a title bond agreeing to convey land, which is subject to a mortgage for the payment of which a third party is primarily liable, of which a third party is primarily liable, of which the vendee has notice, and which is not due for more than a year after the time when a deed is due under the contract, being sued by the vendee to recover the purchase money paid will be allowed to perfect his title within a reasonable time, and having acted with due diligence, so perfected it, and tendered a proper conveyance thereof, even after sult brought out before trial, and no special damage having resulted to the vendee, is entitled to a judgment.

Alt the justices concurring.

A true copy.

Attest:

[SEAL]

Clerk Supreme Court.

7143. Gerhart Becker vs. G. H. Hulme, R. C. Bailey and C. F. Diffenbacker. Error from Barton County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, The plaintiff recovered judgment against one D. on the 19th of February, 1894. After the return of an execution thereon unsatisfied, an order was in December of the same year duly served on the defendants in this case requirserved on the detendants in this case requiring them to answer as garnishees. They answered, denying liability. More than three
years after such answers were filed, this action was commenced; Held, That being an
action on a liability created by statute, it was
barred by the statute of limitations.
All the judges concurring.

C. J. BROWN, Clerk Supreme Court.

O. C. Boyd vs. O. Mills.

Original proceedings in quo warranto. MOTION TO STRIKE OUT PARTS OF PETI-TION-PART SUSTAINED AND PART OVERRULED.

BY THE COURT. ALLEN, J SYLLABUS.

1. That part of section 2, of article 5, of the constitution of this state as amended in 1867, which reads, "No person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted, in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April, A. D., 1861, Provided, That they have served one year or more therein, shall be qualified to vote or hold office in this state until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature," does not conflict with section 10, article 1, of the constitution of the United States, and is a valid constitutional provision.

2. Where the election officers of a township were furnished by the county clerk with official ballots printed on white paper, and also with sample ballots printed on colored paper, in a separate package, and where by mistake the sample ballots were used by all the voters of that township, and the official ballots on white paper were all returned unused by the judges of election, and the election in such township was conducted regularly in every other respect, and the ballots used by the electors of all political parties were of the same color; Held, That such ballots were rightly counted.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN, [SEAL]

Clerk Supreme Court [SEAL]

R. J. Hardesty vs. George B. Cox. Error from Ford County. REVERSED.

BY THE COURT. SYLLABUR ALLEN, J Where the members of a partnership submit to arbitration all matters connected with the winding up of their business, each giving sureties for the performance of his part of the award, and thereafter the arbitrators duly award and determ ne that the members of the firm for whom the defendant is surety, shall pay a note of the firm, which the plaintiff, as their surety, had been compelled to pay; Held, That plaintiff can recover from the surety the amount of the note.

All the justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

C. J. BROWN, Clerk Supreme Court.

David Hubbard, Administrator of the Estate of George B. Lord, Deceased, vs. The Alamo Irrigating and Manufacturing Company.

Error from Johnson County. AFFIRMED. SYLLABUS. BY THE COURT. ALLEN, J

1. This action was brought by the plaintiff to recover trust funds wrongfully mingled by L. a deceased banker, with his own funds. H. administrator of L's. estate. Hayes, a former administrator, and Lord's widow were joined as defendants; Held, That no error was committed in overruling the motion of H. to strike out all allegations with reference to the other defendants. Also, Held, That a demurrer on

the ground that there was a defect of parties defendant was properly overruled.

2. In such an action it is not necessary that all creditors and other persons who may be interested in the estate be brought in as defendants.

fendants.

3. The case of Myers vs. The Board of Education, 51 Kas. 87, followed and approved.

4. A trust fund wrongfully mingled by a trustee with his other funds and property, and retained by him, may be followed and reclaimed from the administrator of his estate, and paragraph 2864 of the general statutes of 1889, providing for the classification of demands against the estates of deceased persons has no application, because such trust funds constitute in equity no part of his estate.

funds constitute in equity no part of his estate.

5. In an equitable action to recover as a trust fund moneys received from bonds sold by L, as plaintiff's agent, where it appears that more bonds were sold than the plaintiff authorized the sale of, and that that the agent kept and used a part of the proceeds; Held, That the allowance by the court in favor of L'a, administrator of compensation for the sale of the bonds authorized to be sold will not be reversed as erroneous.

All the justices concurring.

A true copy.

Attest:

[SEAL]

Clerk Supreme Court.

William Claffin vs. A. H. Case.

Error from Shawnee Coun y AFFIRMED.

SYLLABUS. BY THE COURT. Where vacant land adapted to occupancy and cultivation is conveyed with covenants against incumbrances, or right to convey, and warranty, and the grantee falls for twenty-one years to take possession of the land, which has remained vacant and unoccupled during all that time, and is therefore defeated in an action brought by him to obtain possession from one claiming under a prior, adverse, and better title than his own, and thereupon brings suit upon the covenant of warranty against his granter. Held, That although an action on the warranty did not accrue until the assertion of the superior title, the plaintiff's neglect in falling to take possession of the lands for so long a period, and thereby protect his litle, precludes his recovery on the covenant.

All the justices concurring.

A true copy.

Attest:

C. J. BROWN.

[SERAL]

Clerk Supreme Court.

C. J. BROWN.

The Kansas Farmers' Fire Insurance Com-pany vs. Ben Saindon. Error from Cloud County.

MOTION FOR A RE-HEARING-ALLOWED IN A MODIFIED FORM.

1. Where an insurance policy provides against future incumbrances, the policy may be avoided if a subsequent incumbrance is created, or if the incumbrances existing at the time of the application for the insurance are materially increased by a new or additional debt, but a mere subsequent renewal of a prior lien or mortgage with accrued interest is not an increase of such pre-existing indebtedness or the creation of a new or an additional incumbrance.

2. Where an insurance policy covers a dwelling house and various classes of personal property, including household furniture, beds, books, etc., describing them separately and specifies different and separate amounts on the dwelling and on the personal property, as \$1,900 on dwelling, and \$500 on furniture, beds, books, etc., such contract is severable, and the execution of a mortgage on the real estate in violation of a condition of the policy—against subsequent incumbrances on the property insured in whole or in partis on defense to an action for the loss of the personal property not incumbered.

A true copy

Attest:

C. J. BROWN,

A true copy C. J. BROWN, Clerk Supreme Court.

IN THE SUPREME COURT
OF THE STATE OF KANSAS.

I, C. J. Brown, clerk of the supreme court of
the state of Kansas, do hereby certify that the
foregoing are true and correct copies of the
syllabi of the decisions in the above entitled
cases as the same appear on file in my office.
Witness my hand and the seal of the supreme
court, this lith day of June. 1894. court, this lith day of June, le [SEAL]

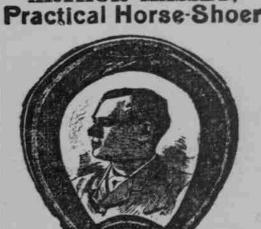
Clerk Supreme Court.

J. C. GILCERIST.



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All the justices concurring.
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Attest
[SEAL] Clerk C. J. BROWN. Error from Labette County. Otis L. Thisler vs. J. J. Miller. AFFIRMED. Original Proceedings in Mandamus.